TABLE OF CONTENTS

Page

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provision And Rule Involved 4

Statement Of The Case 4

Reasons For Granting The Writ 14

Conclusion 24

Appendices

Appendix A – Judgment A-1

Appendix B – Orders B-1

Appendix C – Opinion Dated March 2, 1973 ..... C-1

Appendix D – Opinion Dated September 22, 1970 ..... D-1

Appendix E – Affidavit of Harold Baer, Jr. E-1

Appendix F – Transcript of Hearing Held April 9, 1973 .. F-1

Cases Cited

Barker v. Wingo, 407 U.S. 514 (1972) 15

Brady v. Superintendent, 443 F.2d 1307, 1311 (4th Cir. 1971) 19

Chapman v. United States, 386 U.S. 18, 24 (1967) 21

Coleman v. United States, 442 F.2d 150 (D.C. Cir. 1971) . 19

Dickey v. Florida, 398 U.S. 30 (1970) 15

Fleming v. United States, 378 F.2d 502, 504 (1st Cir. 1967) 19

Hedgepeth v. United States, 364 F.2d 684, 687 n. 3 (D.C. Cir. 1966) 19

Klopfer v. North Carolina, 386 U.S. 213 (1967) 15

Mallory v. United States, 354 U.S. 449 (1957) 21

McNabb v. United States, 318 U.S. 332 22

Murray v. Wainwright, 450 F.2d 465, 471 (5th Cir. 1971) . 19

Reece v. United States, 337 F.2d 852, 853 (5th Cir. 1964) 19

Smith v. Hooey, 393 U.S. 374 (1969) 15

United States v. Alo, 439 F.2d 751, 754-55 (2d Cir. 1971) 9

United States v. Bradford, 231 F.Supp. 187, 188 (S.D.N.Y. 1964) 19

United States v. Ewell, 383 U.S. 116 (1966) 15

United States v. Lustman, 258 F.2d 475, 477-78 (2d Cir.), cert. denied, 358 U.S. 880 (1958) 19

United States v. Marion, 404 U.S. 307 (1971) 15

United States v. Provoo, 17 F.R.D. 183, 203 (D. Md.), aff'd, 350 U.S. 857 (1955) 19

Other Reference

The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 497 (1968) 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

NO.

VINCENT ALO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on April 12, 1973.

OPINION BELOW

The decision of the court below was rendered *per curiam* without opinion. (Appendix A, *infra*, p. A-1). The opinion of the District Court below (Appendix C, *infra*, pp. C-1 - C-11) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix A, *infra*, p. A-1) was entered on April 12, 1973. A timely petition for rehearing was denied on May 10, 1973 (Appendix B, *infra*, pp. B-1 - B-2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a deliberate and avoidable choice by Government authorities to delay petitioner's trial, for three years, after indictment, in an effort to cover up illegal electronic surveillance, was a violation of petitioner's Sixth Amendment right to a speedy trial.

2. Whether the acts of the Government authorities in secreting an indictment against petitioner, in obtaining three years later a new indictment for the same offenses, and in calculatingly refusing to admit the existence of the buried indictment through pretrial, trial, appeal, and certiorari proceedings, despite repeated inquiry from the courts and defense counsel and despite continuing evidence that the courts were being misled, in an effort to cover up illegal electronic

surveillance, constitute a violation of petitioner's Sixth Amendment right to a speedy trial.

3. Where Government authorities have engaged in a pattern of acts of concealment and evasion in order to avoid trial of an indictment of petitioner for three years, and where the concealments and evasions are subsequently uncovered and sharply condemned by the District Court as unworthy and discreditable, whether it is incumbent upon the Government to show beyond a reasonable doubt that there was no possibility that petitioner had been prejudiced in violation of his Sixth Amendment right to a speedy trial.

4. Whether a deliberate delay of three years in bringing an indicted defendant to trial, through suppressing of the original indictment, obtaining an identical fresh indictment three years later, and persistently attempting to keep a veil of secrecy over the original indictment, thereby misleading the trial and appellate courts, creates a presumption of prejudice in violation of petitioner's Sixth Amendment right to a speedy trial.

5. Whether the unworthy and discreditable acts of the Government authorities in this case, denying for three years petitioner's right to a speedy trial on an indictment, in an effort to cover up illegal electronic surveillance, by concealment of the indictment and artful attempts to evade disclosure to the courts at pretrial, trial, appeal, and certiorari proceedings, requires the exercise of this Court's supervisory power to supervise the administration of justice in the federal courts.

6. Whether the failure of the trial court to grant the

defendant a hearing to examine the logs and the living witnesses to admittedly illegal surveillance in order to demonstrate that defendant was never an undisclosed principal of stock, when the Government successfully suppressed knowledge of the existence of the illegal surveillance until petitioner's conviction had become final, is reversible error.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

Rule 33, Federal Rules of Criminal Procedure:

The Court on motion of the defendant may grant a new trial to him if required in the interest of justice . . . .

STATEMENT OF THE CASE

This is a case presenting an issue of the denial of the right to a speedy trial. It demonstrates sharply how the right to a speedy trial can be destroyed by illegal actions of the Government which reverberate through a sordid series of evasions and attempts to cover up the illegality.

On October 14, 1966, an indictment was returned against petitioner in the United States District Court for the Southern District of New York. 66 Cr. 75. Over the next six years, the Government has tried to conceal that indictment from the defendant and from the federal courts. Its motives for the concealment were stamped as unworthy by the district

court; its methods of carrying out the scheme to keep the facts from coming out are indefensible.

The first step in the covert operation was to seal the indictment. Two years later, in a confidential memorandum from the Chief of the Fraud Section of the Criminal Division of the Department to the Assistant Attorney General in charge of the Division, the reason for the furtiveness was given. The Government had engaged in illegal electronic surveillance of a lawyer associated with petitioner. The Chief of the Fraud Section wrote: "Immediately after the return of the indictments, United States Attorney Morgenthau expressed great concern over the disclosure of these logs, because he did not want to spread on the record that the Department had engaged in electronic surveillance of a member of the bar." (Appendix C, *infra*). This extraordinary memorandum was finally brought to light in 1972 when the Government submitted a copy of it *in camera* to U.S. District Judge Motley. (Tr. of Hearing, Aug. 21, 1972, p. 34). Judge Motley reproduced the "pertinent part" of the memorandum in her Opinion in the proceedings below. (Appendix C, *infra*).[1]

When the Department of Justice memorandum was written, the Government was contemplating opening the sealed 1966 indictment. The Chief of the Fraud Section speculated on the course of the prosecution. He denied that the Government should voluntarily disclose its illegal conduct and the fruits, but says ". . . it is possible that the existence of the

1. The Government's discomfiture that this memorandum came to light is revealed in its continued, irrelevant suggestion that petitioner obtained it "unlawfully." (Tr. of Hearing on Aug. 21, 1972, p. 34; United States Brief in the Court of Appeals below, p. 4).

Malnik logs will be discovered. . . . It is not at all certain that the Malnik logs will be disclosed if Alo is prosecuted. However, there is always the possibility that such disclosure may become necessary." (App. C, *infra*).

The Government did not unseal the 1966 indictment. Instead, the Government sought and obtained a brand new indictment, on October 27, 1969, in the United States District Court for the Southern District of New York. 69 Cr. 746. What led to this decision by the Government has yet to be revealed. The 1969 indictment was identical to the 1966 indictment. Government prosecutors have repeatedly described it as "in the nature of a superseding indictment." (Tr. of Hearing, Feb. 3, 1970, p. 20; Tr. of Hearing, Aug. 21, 1972, p. 39). In August 1972, responding to a subpoena, the Government finally produced the 1966 indictment and it was introduced into the record (*Id.* at pp. 57-58).

The Government proceeded to try the 1969 indictment. Brazenly, through a series of judicial proceedings at the trial level, the Court of Appeals level, and even in this Court, the Government prevented the facts from coming out concerning the existence of the 1966 indictment and the indefensible concealment of it.

A pretrial proceeding before U.S. District Judge Weinfeld on February 3, 1970, set the pattern for the Government's dissembling: Counsel for defendant suggested to Judge Weinfeld that he suspected that a 1966 indictment existed. The Court, aware only of a 1969 indictment pending, said of the suggested earlier indictment: "How could it not be a matter of public record." Defense counsel responded: "It is an easy inquiry, your Honor. I don't ask it in an idle way. I have

spent time considering the facts of this case. If your Honor sees fit to ask the United States Attorney, whatever he says I accept. But I suspect, without being too paranoid about the facts of this case, that in 1966, when this man appeared before the grand jury, he was indicted, and for some reason that indictment lay dormant, known to nobody." Judge Weinfeld, unconsciously prescient, replied: "That would be a rather remarkable state of affairs, wouldn't it?" The Court turned to the Government prosecutor for information and the following exchange occurred:

> "THE COURT: You are not answering the question he is asking, Mr. Zirin. He puts a direct question to you: Was there a prior indictment? . . . .
>
> "MR. ZIRIN: I am willing to concede for the sake of argument – and I haven't investigated all of the facts – but I am willing to concede for the sake of argument that there was a prior sealed indictment. This would be in the nature of a superseding indictment." (Tr. of Hearing, Feb. 3, 1970, pp. 11-13, 20).

Presumably Government counsel would not want to make an outright lie to the Court. In his response, Mr. Zirin never indicated how much he knew of the considerable history already encrusting the case; it is literally safe to deny investigation of *all* of the facts. The bizarre concession "for sake of argument" remained the Government's official position throughout the trial, the appeal and the certiorari proceedings in this Court.

Defense counsel renewed the hunt for the buried indictment in July of 1970. An evidentiary hearing concerning the prior indictment was requested. The Government resisted and Government counsel again refused to admit or deny the existence of a prior indictment, stating:

> "We are going off on the tangent about whether there was or wasn't a prior sealed indictment returned in this case in 1967 or what have you. What we have before Your Honor is a 1969 indictment. The Government is ready, willing and able to go to trial in this case since the time it has been filed."

(Tr. of Hearing, July 13, 1970). Denying defendant's claim of deprivation of the right to speedy trial, the District Court declared on the eve of the trial:

> "Defendant has not shown that the reason for the delay in prosecution was unworthy, despite unsubstantiated allegations to the effect that defendant was indicted on the same charges secretly in 1966."

(Memorandum Opinion of Judge Motley, September 22, 1970, Appendix D, *infra*, D-1 - D-2.)

After a four day trial, Judge Motley sentenced petitioner to two concurrent terms of imprisonment and to an aggregate fine of $10,000. Counsel for the defense sought bail pending appeal.

> "MR. GOLDBERG: Well, I have a number of points. Point 1 is that the defendant was denied his right to a speedy trial, that he was indicted in 1966, that the Government, in an effort to obstruct defense counsel from finding that he was indicted in 1966, buried that indictment which caused Judge Weinfeld to find that this was a remarkable state of affairs . . . .
>
> "THE COURT: You made that allegation before Judge Weinfeld and before me. You have some duty to prove that allegation."

(Notes of T. Alo's App. p. 583). Government counsel sat

mutely and allowed the Court to state that the very existence of the 1966 indictment was an unsubstantiated figment of defense counsel's imagination, to say nothing of the purposes for its concealment.

The success of the Government strategy in avoiding the facts surrounding the 1966 indictment continued on appeal from petitioner's conviction. The Court of Appeals for the Second Circuit opinion states: "Although the government has steadfastly refused to concede the existence of a 1966 indictment, neither has it denied Alo's contention. Both parties have argued the case on the assumption that such an indictment was returned, and we will do the same." *United States v. Alo*, 439 F.2d 751, 754-55 (2d Cir. 1971). The Court surmised that the Government might be trying to cure apparently intolerable delay in bringing the 1966 indictment to trial by "a simple expedient [of] reshuffling substantially identical documents." *Id.* at 755. Indeed, the Government disdainfully argued that the delay prior to the filing of the 1969 indictment was pre-indictment delay! *Id.* at 755 n.5. The Court of Appeals, upholding the conviction, never realized the true situation and the Government's subterfuge.

This Court denied petitioner's request for review by certiorari and his subsequent motion for disclosure by the Government and rehearing by the Court. 404 U.S. 850, 961 (1971).

The effort to ferret out the truth continued, while petitioner remained in prison. In May 1972, a motion was filed to dismiss the indictment or alternatively to grant a new trial on the grounds of after discovered evidence. In support of the motion, an affidavit of counsel referred to the 1968

Department of Justice memorandum. Denial of this motion, and affirmance of that denial underlie the present petition to this Court for certiorari.

The Government moved to force withdrawal of new counsel for petitioner, Michael S. Fawer, Esq., on the ground that he had previously served through 1968 as Assistant United States Attorney in the Southern District of New York. In this hearing, apparently for the first time the Government conceded that there had been an indictment in 1966 and that it had been sealed. Richard A. Givens, Esq., testified that he thought a sealed indictment should be obtained along with an arrest warrant so that petitioner would not flee before he was arrested. (Tr. of Hearing, June 2, 1972, p. 71). Former prosecutor Givens said that he recalled two other reasons for the suppression of the indictment:

> "... subsequently it had developed that there had been a bug placed in a law office, or near a law office, of Alvin Malnick and that this created a problem because Alo might contend that he was mentioned in some way in these transcripts, which I had seen and never did read.
>
> "Subsequently I believe that there may have been some reference to further SEC officials who might have been suspected as being the possible leak of information about the immunity and as to whether the indictment should be unsealed before that inquiry had been completed that might shed light on what happened ... ."

(*Id.* at 71-72).

Petitioner's motion came to hearing before Judge Motley in August 1972. In this proceeding the Government turned over the Department of Justice memorandum, albeit with the

request that the Judge alone see it. (Tr. of Hearing, Aug. 21, 1972, p. 34). Counsel for the Government hopefully characterized the Government's now revealed secrecy and deceit as "most legitimate law enforcement reasons." (*Id.* at 38, 57). Petitioner's complaints about the Government behavior were deemed "scurrilous." (*Id.* at 38). An effort was made to imply that Mr. Zirin, the original prosecutor, took a consistent position from the beginning in stating that there was an indictment. (*Id.* at 39). The obvious awkwardness for the Government of the 1968 Department of Justice memorandum was a problem; the prosecutor tried to solve it by disclaiming the Department: "This memorandum has never been in the United States Attorney's office. As you can see by the covering letter, your Honor, I received this May 15, 1972 from the Chief of the Organized Crime-Racketeering Section, Mr. Lynch. . . . I can represent that none of the attorneys connected with the trial or the appeal of this case had any knowledge of this memorandum." (*Id.* at 38). The Government counsel did admit that the memorandum reflected "high level discussions in the Department of Justice." (*Id.* at 37). Government counsel's point, evidently, is that the United States Attorney's office was as much the victim of being duped as were the courts and petitioner.

On March 2, 1973, the District Court denied petitioner's motion. Judge Motley held that ". . . the Government's reasons for delay in bringing defendant to trial were unworthy. . . ." (Appendix C, *infra).*

> "The court finds that the primary reason for the delay in the prosecution of defendant was the Government's concern that his prosecution would lead to disclosure of the illegal electronic surveillance of Malnik's office and that such disclosure would be embarrassing to the

> Government because it would 'spread on the record that the Department [of Justice] had engaged in electronic surveillance of a member of the bar.' "
>
> "... [T]he essential reason for the delay, the desire to conceal the fact of illegal electronic surveillance by the Government, was unworthy and discreditable."
>
> "... [T]he Government's failure at the appropriate time to disclose to this court or to the Court of Appeals the reasons for the suppression of the 1966 indictment is to be firmly condemned ... ."

Despite the verbal reprove, the District Court allowed the Government to keep its ill-gotten gains. Concluding that there was no harm or prejudice to the defendant in the Government's "unworthy and discreditable" behavior, the Court denied all relief.

Petitioner's contention that the logs of the illegal electronic surveillance constituted newly discovered evidence was also rejected by the District Court. Government counsel stated to the Court that the logs did not show any conversations involving petitioner overheard by the illegal bug. He maintained that he had made specific and repeated inquiry on this from the Department of Justice in 1970. (Tr. of Hearing, Aug. 21, 1972, p. 48). Government counsel implied that colleagues of petitioner had been overheard, but tried to mask this by describing them as "allegedly ... not nice people." (*Id.* at 49). With no apparent sense of the irony of such an assertion in this case, Government counsel declared:

> "... there is no evidence that the high officials in the Department of Justice and the Organized Crime Division of the FBI, who made a check of the logs, are pulling a fast one or attempting not to tell your Honor the truth

> . . . . I don't know what more we can do your Honor." (*Id.* at p. 50). Without allowing petitioner to see the logs or inspecting them herself, Judge Motley became "convinced that this 'evidence' would have had the slightest relevance, if any, at defendant's trial."

After the appeal to this Court had been docketed, on March 12, 1973 a request was made to the court below by the Government by letter that "the Court modify the last sentence of its opinion". That last sentence, in part, read as follows:

> "While the Government's failure at the appropriate time to disclose to this Court or the Court of Appeals the reasons for the suppression of the 1966 indictment is to be firmly condemned . . ."

This request was denied and the *same day* the Government took the extraordinary step of filing an affidavit as part of the appellate record. (Appendix E, *infra*). The substance of the affidavit was an assertion by former Assistant United States Attorney Harold Baer, Jr. that he had been informed *in 1970* by the prosecutor in this case that Judge Motley had written an opinion "which was inaccurate." This opinion referred to is the September 22, 1970 opinion by Judge Motley, on the eve of trial, in which she described the defendant's allegation of a 1966 secret indictment as "unsubstantiated." According to Mr. Baer's 1973 affidavit, the trial prosecutor, Mr. Naftalis, discussed the matter in 1970 and decided that "this should be corrected immediately." This is back in September 1970. An *ex parte* oral communication that there was a 1966 indictment, was made to Judge Motley by Mr. Baer. Defense counsel was never informed. But the trial and appeal proceeded without the slightest change in the Government's "steadfast" refusal to admit the existence of the 1966 indictment.

Counsel for petitioner took a copy of the Baer affidavit to Judge Motley who called immediately for a hearing, on April 9, 1973, three days before argument in the court below. Government counsel disclosed his motive in belatedly trying to involve Judge Motley in the knowledge of the secret indictment:

> "The reason why we deemed it appropriate to get Mr. Baer's affidavit setting out his best recollection of the facts was that one of the arguments made on the appeal in this case was that you were denying Mr. Alo's speedy trial motion at the time of the trial which indicated unsubstantiated application of a concealed indictment, et cetera, that the Government, knowing full well that there was some kind of indictment, just sat back there and failed to disclose to the Court, and we just didn't want to be subject to that kind of criticism in the Court of Appeals since Mr. Baer had, in fact, informed you of that fact."

(Tr. of Hearing, April 9, 1973, App. F, *infra*).[2] Judge Motley stated that it was her recollection that the defendant also would be informed of this sealed indictment but "apparently you did not tell the defendant that this indictment had been found so he never renewed his motion . . . " (App. F, p. 4).

The Court of Appeals affirmed the decision of the District Court *per curiam* without opinion, April 12, 1973. Rehearing was denied on May 10, 1973.

REASONS FOR GRANTING THE WRIT

The questions presented by this case are major issues

---

2. Obviously the trial prosecutor Mr. Naftalis, knew of this 1966 sealed indictment, yet concealed its existence from defense counsel.

dealing with the constitutional right to a speedy trial and the administration of justice in the federal courts. Rarely does a case present a series of questions so plainly calling for the exercise of this Court's power as the highest authority on interpretation of the Constitution and the custodian of the essential qualities of fairness and due process in the administration of justice. Without elaborate argument on the merits of the issues, it is appropriate to develop briefly how the questions presented affect vitally the quality of criminal proceedings in the courts of the United States and why petitioner urges this Court to grant the petition for writ of certiorari.

First, this case presents an important and a new dimension of the Sixth Amendment right to a speedy trial. The Court has only recently begun to build a body of interpretation of this constitutional right. The secreted indictment in this case was returned by the grand jury in 1966. In the years since then, this Court has decided several major cases giving meaning to the Sixth Amendment guarantee of the right to a speedy trial. *United States v. Ewell,* 383 U.S. 116 (1966); *Klopfer v. North Carolina,* 386 U.S. 213 (1967); *United States v. Marion,* 404 U.S. 307 (1971); *Barker v. Wingo,* 407 U.S. 514 (1972). See also *Smith v. Hooey,* 393 U.S. 374 (1969); *Dickey v. Florida,* 398 U.S. 30 (1970).

As this Court noted, the first of these cases in which the Court attempted to set out the criteria by which the speedy trial right is to be judged was last Term's decision in *Barker v. Wingo.* The Court declared that the right to speedy trial can be determined only on an *ad hoc* balancing basis in which the conduct of the prosecution and that of the defendant are weighed. Four factors were identified as relevant to this

balancing: length of and reason for the delay, diligence of the defendant in seeking trial, and prejudice to the defendant. The Court specifically declared that "... none of the four factors identified above are either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." 407 U.S. at 533. The dispositive factors in *Barker v. Wingo* were the lack of serious prejudice to the defendant and the fact, most significant in the Court's analysis, that defendant did not want a speedy trial. The Court held that these factors outweighed opposing considerations.

The vital factor in this case is the significance of the conduct of the prosecution. In *Barker v. Wingo,* this Court said: "The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." 407 U.S. at 530. The defendant's conduct and injury to the defendant became overriding in the Court's analysis of the delay in *Barker.* This has been the essential quality of the Court's prior decisions under the speedy trial guarantee as well. For the first time, in sharp relief, this case presents a pattern of conduct by the prosecution that assumes overriding significance. The length of delay is itself extreme. Three years of delay in bringing a defendant to trial *after indictment* is among the longest periods in the annals of reported decisions. A similar period of *pre-indictment* delay in *United States v. Marion, supra,* was considered seriously by this Court under the Due Process Clause as ground for relief, in the absence of any suggestion of improper prosecution conduct. There is no precedent for the conduct of the Government authorities in this case. The consequence of the deliberate and avoidable behavior of the prosecutors, soundly condemned by the District Court below, on the balancing

test, in which the conduct of both the prosecution and the defendant are weighed, is a timely and important issue for this Court's determination.

The District Court, despite the harsh characterization of the prosecutors' conduct, acted on the plainly erroneous theory that the demonstration by the defendant of specific and serious prejudice is essential in a speedy trial determination. This Court said precisely the opposite in *Barker v. Wingo*. None of the four factors, prejudice being the last one articulated by the Court, is a necessary condition to finding a violation of the Sixth Amendment right.

Assuming for the present purposes that the demonstration of prejudice was not specific, the record in this case is overwhelming on this Court's first three factors. The length of the delay, as indicated, is extreme. The defendant has asserted the right to speedy trial diligently and at every opportunity; only the Government's obtuse behavior in concealing the 1966 indictment and steadfastly evading all efforts to bring out the true facts prevented earlier demonstration of the grossly improper motives that underlay the Government's actions. The reason for the delay is amply revealed in the disclosures wrung from a resisting Government over a substantial number of years and multitudinous court proceedings. There are still aspects of the case that defy understanding. No explanation has been offered for the failure to "unseal" the 1966 indictment when the prosecutors finally decided that it was safe to go ahead with a trial. Nor has any justification been provided for the extensive cover up efforts and artful subterfuges in the court processes, unless one considers the eleventh hour attempt by the Government to involve the trial judge in knowledge as showing that at least she was not completely deceived.

The District Court condemned the conduct of the Government as unworthy and discreditable. The prosecutors' decisions were deliberate and avoidable. Their purpose to hide the facts of illegal electronic surveillance of a member of the bar is reprehensible. The other reasons belatedly invented for the sealing of the indictment are patently further subterfuge. The subsequent prosecution of an SEC officer had nothing whatsoever to do with petitioner's case. The alleged fear of defendant's flight was wholly illusory and without any basis whatsoever; related to the three year delay it becomes ludicrous. Only the noxious fear of disclosure of the Government's own wrongdoing is mentioned in the Department of Justice memorandum.

The facts on the first three of this Court's factors to be considered in balancing the conduct of the prosecution that of the defendant are so strongly evident that a speedy trial right has been violated that the manifest possibility of prejudice is sufficient to find for the petitioner in this case. Certainly, this case presents an issue which is worthy of consideration and review by this Court.

Second, even if the existence of specific prejudice is a necessary ingredient in the balancing of the conduct of the prosecution and that of the defendant in this case, the manner of approaching the subject of prejudice is an issue well deserving this Court's urgent attention. Petitioner submits that the burden of proof on the issue of prejudice ought not to be placed on the defendant where the post-indictment delay is so extreme as in this case, where the defendant sought diligently to vindicate his right to a speedy trial at every occasion, where the prosecution impeded the assertion of the defendant's right by its inexcusable dissembling, and

where the prosecution's reason for the initial delay and the subsequent cover up is so plainly reprehensible.

This Court might well decide, extending the analysis of *Barker v. Wingo*, that these circumstances give rise to a presumption of prejudice that is rebuttable only by affirmative evidence adduced by the Government to disprove the possibility of injury to the defense. In *Barker*, the Court referred to the length of delay alone as a "triggering mechanism" such that where long enough a presumption of prejudice arises. 407 U.S. at 530. It is clear, of course, that this case presents a case of extreme post-indictment delay that ought to trigger that presumption. See *Coleman v. United States*, 442 F.2d 150 (D.C. Cir. 1971 (21 month delay found extreme). Coupled with the Government's peccancy, and in light of the timely defense efforts to bring the matter forward, an overwhelming set of forces arise for the recognition of the presumption of prejudice. See *United States v. Provoo*, 17 F.R.D. 183, 203 (D. Md.), aff'd, 350 U.S. 857 (1955).

Various Courts of Appeals have recognized that there ought to be no requirement that a defendant demonstrate specific forms of prejudice where the Government has caused the delay. See *Murray v. Wainwright*, 450 F.2d 465, 471 (5th Cir. 1971); *Brady v. Superintendent*, 443 F.2d 1307, 1311 (4th Cir. 1971); *Fleming v. United States*, 378 F.2d 502, 504 (1st Cir. 1967); *Hedgepeth v. United States*, 364 F.2d 684, 687 n. 3 (D.C. Cir. 1966); *Reece v. United States*, 337 F.2d 852, 853 (5th Cir. 1964); *United States v. Lustman*, 258 F.2d 475, 477-78 (2d Cir.), cert. denied, 358 U.S. 880 (1958). The *Lustman* declaration was underscored in *United States v. Bradford*, 231 F.Supp. 187, 188 (S.D.N.Y. 1964).

As this Court said in *Barker v. Wingo*, there are circumstances where delay can be a defense tactic. 407 U.S. 521. Thus delay cannot be deemed *per se* to prejudice the defendant. On the other hand, specific proof of prejudice frequently entails the virtually impossible task of proving a negative proposition. In *United States v. Ewell*, this Court described the objective of the right to a speedy trial as "to limit the possibilities that long delay will impair the ability of an accused to defend himself." 383 U.S. at 120. Those possibilities extend well beyond the limited circumstances in which a defendant can show affirmative change of circumstances that meet the requirement of demonstrable prejudice. The interest of vindicating the right to speedy trial requires a broader inquiry. "[J]judicial concentration on proof of actual prejudice detracts from a consideration of the causes of delay in the criminal process." Note, *The Right to a Speedy Trial*, 20 *Stan. L. Rev.* 476, 497 (1968). The notewriter cogently argues that prejudice be presumed in any case involving more than *de minimis* delay and that, unless the delay is attributable to the defendant, the burden of proof should be on the Government.

By the device of speaking only to the issue of prejudice in this case, the Government is continuing to try to avoid being called to account for its own conduct. The prosecuting authorities created the delay. They did so for reasons now discerned to be illegitimate. The delay was extreme. Unless the burden of proof to show non-prejudice lies on the Government, they will escape from this case with nothing but the verbal admonition registered by the District Court. The interest in vindicating the Sixth Amendment guarantee of a speedy trial will be wholly submerged.

Further, petitioner suggests that the proper standard on the Government's burden of proof is proof beyond a reasonable doubt. The Government would be put to establishing in effect that its nefarious conduct, while error, was harmless error. This Court has defined the quantum of the burden of showing harmless error in constitutional adjudication in he dimension of beyond a reasonable doubt. *Chapman v. United States*, 386 U.S. 18, 24 (1967). The analysis is equally pertinent to the situation in this case.

Whatever the outcome of this set of issues, they plainly extend and refine the doctrines concerning the constitutional right to speedy trial. It needs no argument to demonstrate today that the elimination of delay in the administration of criminal justice is basic to the health of the federal judicial system. Delays induced by the Government are particularly invidious. Unless the right to speedy trial is freed from the unwarranted constraints imposed by the courts below in this case, the possibility of even addressing the quality of the conduct of the prosecution is lost. To make a reality of this Court's approach in *Barker v. Wingo*, of balancing the conduct of the prosecution as an important part of the judgment to be rendered, the allocation of the burden of proof of specific prejudice must follow the cause for the delay. When so allocated, the nature of the burden is also of vital significance. These are matters which, we respectfully submit, fully warrant this Court's review in this case.

Third, petitioner contends that this case is appropriate for review even without meeting the full set of requirements for showing violation of the Constitution. This Court has the power, and the duty, to supervise the administration of justice in the federal courts. *Mallory v. United States*, 354 U.S. 449

(1957); *McNabb v. United States*, 318 U.S. 332. In *Barker v. Wingo*, this Court recognized and affirmed the exercise by federal courts of their supervisory powers to vindicate the right to a speedy trial.[3] 407 U.S. at 530 n. 29. The particular form of exercise of those supervisory powers there cited was the power to adopt a presumptive rule establishing a fixed time period within which cases must normally be brought. It is also appropriate for this Court to employ its supervisory powers to cleanse the system of justice from the impurities that the Government has deliberately introduced in this case.

It is a work of supererogation to argue in these days the importance of integrity in the workings of government and the radiating damage done when the system is allowed to fester with discreditable and unworthy behavior by federal officers. The time is ripe for the rooting out of seriously arrant behavior. Should the Court believe that it is impossible or unwise to set this case down under the Sixth Amendment, we submit that the facts raise an important question for the Court's supervisory powers.

Fourth, the question of the significance of the newly discovered evidence is an important issue. Despite the cover up efforts that succeeded for many years, the Government was forced to disclose that it had maintained illegal electronic surveillance in 1963 on a member of the bar and an associate of petitioner. Unfortunately for petitioner, this disclosure came after the trial and the appeals in his case had already been concluded. Thus, the issue arises whether the fruits of

---

3The prosecutors' failure to inform defendant of the sealed indictment in 1970, after telling Judge Motley they would do so, is an independent aspect of Government misbehavior warranting supervision by this Court.

the illegal bug might have aided the defense of the charges. Walking an extremely narrow tightrope, the prosecutor contended that the logs did not show any conversations in which petitioner participated. The prosecutor virtually conceded that other associates of petitioner were overheard. In particular, reference was made to one Mr. Catena. (Tr. of Hearing, Aug. 21, 1972, p. 49). The charges for which petitioner was convicted involve obstruction of justice and one of the issues involved was the ownership of certain stock. As the opinion of the Court of Appeals indicates, the status of Mr. Catena was an important dimension of the case. *United States v. Alo*, 439 F.2d 751, 752-53 (2d Cir. 1971). The illegal bug was in the office of an attorney, Alvin Malnik, who plays a very prominent role in the prosecution theory against petitioner. Plainly there was sufficient basis to believe that the fruits of the illegal surveillance might be relevant to turn them over to the defendant. The Government contended that it had no obligation to make disclosure and the District Court was persuaded by argumentation that the logs were not relevant. Having so laboriously unearthed the root of the Government's improper actions, petitioner was entitled to examine the evidence to determine whether and how it may have exonerated him.

The force of this argument is not diminished by the position of the Government that since Malnik had been an associate of petitioner in the past, and since the Government had turned over the logs of the surveillance to Malnik, petitioner must therefore have access to them. (Tr. of Hearing, Aug. 21, 1972, pp. 53-55). The irony of this argument was apparently lost on the prosecutor, who had only moments before asserted in effect that the United States Attorney's office in New York should not be confused with

the Department of Justice in Washington (*Id.* at 38). Presumably it is the Government's theory that communications within the Department of Justice are less reliable than those between persons of undefined association.

CONCLUSION

Petitioner has been continuously in prison since October 1970. Because of the good time provision and meritorious conduct, there is approximately eight months remaining of this prison sentence. For the reasons set forth in this petition, it is respectfully submitted that this Court should grant the writ of certiorari.

Respectfully submitted,

Barry I. Slotnick
Attorney for Petitioner

May, 1973

APPENDICES

APPENDIX A

COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of April, 1973

PRESENT: Hon. J. Joseph Smith
Hon. Paul R. Hays
Hon. William H. Timbers
Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v-

VINCENT ALO,
Defendant-Appellant

73-1380

Appeal from the United States District Court
Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the orders of the said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

---

* * * * * *

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Courthouse, in the City of New York on the 10th day of May, 1973.

* * * * * *

A petition for rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and it is hereby denied.

---

* * * * * *

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Courthouse, in the City of New York on the 10th day of May, 1973.

* * * * * *

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active Circuit Judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the tenth day of May, one thousand nine hundred and seventy-three.

Present:

HON. J. JOSEPH SMITH
HON. PAUL R. HAYS
HON. WILLIAM H. TIMBERS,
Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

VINCENT ALO,
Defendant-Appellant

73-1380

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of May, one thousand nine hundred and seventy-three.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

VINCENT ALO,
Defendant-Appellant

73-1380

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

VINCENT ALO,

Defendant.

---

69 CR. 746

APPEARANCES:

HON. WHITNEY NORTH SEYMOUR, JR.
United States Attorney
By Gary P. Naftalis, Asst. U.S. atty.
* * * *

SLOTNICK & NARRAL
By Barry Ivan Slotnick
* * * *
Attorney for Defendant

CONSTANCE BAKER MOTLEY, D.J.

OPINION ON MOTIONS TO VACATE CONVICTION AND FOR NEW TRIAL

On October 27, 1970, defendant was sentenced in this Court to serve concurrent terms of five years in prison and to pay fines totalling $10,000, after his conviction by a jury on two counts of unlawfully obstructing the Securities and Exchange Commission's administration of the federal securities laws. 18 U.S.C. § 1505. The conviction was affirmed by the Court of Appeals in *United States v. Alo*, 439 F.2d 751 (2d Cir. 1971). The Court of Appeals denied subsequent petitions for rehearing (April 24, 1971) and for rehearing *en banc* (May 4, 1971). The Supreme Court denied certiorari, 404 U.S. 850 (1971), and subsequently denied a motion for disclosure and a petition for rehearing, 404 U.S. 961 (1971).

The motion for disclosure sought disclosure of a confidential internal Department of Justice memorandum containing information which shows:

1) that a sealed indictment was returned in 1966 charging defendant with the identical crimes charged against him in the 1969 indictment on which he was convicted; and

2) that defendant was not promptly brought to trial on the 1966 indictment for improper reasons on the part of the Government.

Defendant now moves for an order vacating the judgment of conviction, although based on the 1969 indictment, on the ground that the memorandum constitutes newly discovered evidence establishing that he was denied his Sixth Amendment

right to a speedy trial on the 1966 indictment. 28 U.S.S. § 2255. In the alternative, defendant moves for a new trial on the ground that the newly discovered evidence requires a new trial in the interest of justice. Rule 33, Fed. R. Crim. P.

The motions are denied. The court holds: 1) although the Government's reasons for delay in bringing defendant to trial were unworthy, its motive was not to gain a tactical advantage over defendant but to save the Government from embarrassment and this delay did not result in any prejudice to defendant; 2) there is no such newly discovered evidence as would warrant a new trial in the interest of justice.

I. The Newly Discovered Evidence

Prior to his trial, defendant moved this court for dismissal of the indictment against him on the ground that he had been denied the right to a speedy trial. The indictment, 69 Cr. 746, was filed October 27, 1969. Defendant did not contend that there was any undue delay in his prosecution after that date. Rather defendant alleged that a "secret" 1966 indictment existed containing charges identical to those appearing in the 1969 indictment and that the delay of approximately three years following the filing of the 1966 indictment violated his right to a speedy trial.

This court denied the motion in a memorandum opinion dated September 22, 1970. In the opinion, the court noted that the allegation that defendant was "secretly" indicted on the same charges in 1966 was "unsubstantiated," but, in any event, the court ruled that defendant's failure to establish any prejudice from the alleged delay barred his claim.

On appeal of his conviction, defendant raised the speedy trial issue. In the Court of Appeals, the Government "steadfastly refused to concede the existence of a 1966 indictment," but neither did it deny its existence. 439 F.2d at 754. The Court of Appeals assumed *arguendo* that there was a 1966 indictment and proceeded to reject petitioner's claim on the ground that no prejudice was shown. *Id.* at 755.

In connection with this motion, the Government has now produced, upon demand by defendant, the memorandum. [Hereinafter referred to as the Edelhertz Memorandum.] The Edelhertz Memorandum, which is dated November 4, 1968, reads in pertinent part as follows:

TO: Mr. Fred M. Vinson, Jr.
Assistant Attorney General
Criminal Division

FROM: Mr. Herbert Edelhertz
Chief, Fraud Section
Criminal Division

SUBJECT: *United States v. Vincent Alo*

Vincent Alo was indicted in the Southern District of New York on October 14, 1966. The indictment is in two counts and charges him with the obstruction of proceedings before the Securities and Exchange Commission in that he gave false information as a witness in an investigation of Tel-A-Sign, Inc. The indictment is sealed, and the question is whether it can now be opened.

The indictment has been kept sealed because another indictment, returned on the same day, charges Alvin Malnik, a Miami attorney, with violations of the mail fraud statute in connection with the sale of distributorships for Scopitone machines and fraud on the stockholders of Scopitone and Tel-A-Sign, and Malnik was the subject of

electronic surveillance. Tel-A-Sign is the common thread running through both indictments. Immediately after the return of the indictments, United States Attorney Morgenthau expressed great concern over the disclosure of these logs, because he did not want to spread on the record that the Department had engaged in electronic surveillance of a member of the bar. Assistant United States Attorney Givens now proposes the dismissal of the indictment as to Malnik, and the opening of the Alo indictment in order to proceed with his prosecution.

Alo was not the direct subject of electronic surveillance, there is no indication he was overheard, and it can be established that the indictment against him rests on independent evidence unrelated to the Malnik installation. The surveillance of Malnik's office extended from July 5, 1963 to September 17, 1963. The Securities and Exchange Commission commenced its investigation after Tel-A-Sign filed a registration statement in 1964, disclosing that Malnik and others were to receive large quantities of stock with a then high market value in return for minimal investments. Alo was called as a witness by the Commission in May 1966 and gave false and evasive answers to questions. The Securities and Exchange Commission investigation was brought to the attention of the United States Attorney in 1965, and a Grand Jury investigation commenced in the fall of that year. If we are to try Alo, the court would probably permit detailed inquiry into the Grand Jury proceedings and it is possible that the existence of the Malnik logs will be discovered. Since Alo himself was never the subject of electronic surveillance, nor overheard as far as we can tell, it is my view that the Department has no obligation to make voluntary disclosure. Even if the existence of the logs is discovered, it is possible that we could prevail in an effort to bar disclosure of the contents by showing that the surveillance was terminated in September 1963, the Securities and Exchange Commission commenced its investigation on November 27, 1964, and the false testimony was given in 1966.

* * *

It is not at all certain that the Malnik logs will be disclosed if Alo is prosecuted. However, there is always the possibility that such disclosure may become necessary.

The government has also produced another memorandum, dated November 13, 1968, which reads as follows:

Mr. J. Walter Yeagley
Assistant Attorney General
Internal Security Division

Mr. Fred M. Vinson, Jr.
Assistant Attorney General
Criminal Division

Ad Hoc Committee:
United States v. Vincent Alo

Transmitted herewith is a memorandum [the Edelhertz Memorandum] pertaining to the electronic surveillance of Alvin Malnik, which may affect the prosecution of the above-designated case. Copies are being made available to other members of the Committee.

cc: Mr. Rogovin, Tax Division
Solicitor General
Mr. Vinson

II. Findings of Fact

The court finds that the primary reason for the delay in the prosecution of defendant was the Government's concern that his prosecution would lead to disclosure of the illegal electronic surveillance of Malnik's office and that such disclosure would be embarrassing to the Government because it would "spread on

the record that the Department [of Justice] had engaged in electronic surveillance of a member of the bar." *See* Naftalis Affidavit, dated July 21, 1972, at 4; Transcript of August 21, 1972 Hearing, at 46.

The court finds that another reason for the delay in defendant's prosecution was that the Government was investigating whether "a corrupt SEC official . . . was leaking information on the [Tel-A-Sign] investigation to Alo." The Government has stated that "it was deemed appropriate that the Alo indictment not be unsealed" until this investigation was completed. Naftalis Affidavit 4.

The court further finds that the Government is not in possession of any recorded statements of petitioner which were the product of electronic surveillance of Mr. Malnik. The Government represented at trial that petitioner was not overheard on any electronic surveillance. The Edelhertz Memorandum states that "there is no indication [defendant] was overheard" and that he was not "overheard as far as we can tell" in the course of the electronic surveillance of Malnik. The Department of Justice has once again looked into the matter and has found no indication that petitioner was at any time overheard by electronic surveillance. *See* Naftalis Affidavit, dated July 21, 1972, Exhibit A (Letter to United States Attorney Seymour from Henry E. Petersen, Assistant Attorney General, Criminal Division, Department of Justice, dated June 1, 1972.) Defendant's counsel has alleged that defendant and Malnik spent considerable time together in Malnik's office during the period of the illegal surveillance; however, defendant has produced no evidence to substantiate this allegation.

III. Conclusions of Law

Defendant contends that the logs of the electronic surveillance of Malnik's office in July through September of 1963 constitute newly discovered evidence which warrants the granting of a new trial. Rule 33, Fed. R. Crim. P. Even assuming that the existence of these logs was not readily discoverable by defendant prior to his trial, the court is convinced that this "evidence" would have had the slightest relevance, if any, at defendant's trial.[1]

Defendant suggests that the logs may contain recorded statements of Malnik or other persons which might exculpate petitioner. However, defendant's conviction was based on his testimony at an SEC investigative proceeding in 1966 during which he was questioned about events which occurred in 1964. Since the Malnik surveillance terminated in September, 1963, the court cannot imagine how the logs could provide exculpatory evidence. Defendant's argument in this regard is unconvincing. Therefore, the court holds that a new trial is not required in the interest of justice.

Turning to petitioner's speedy-trial motion, the court must evaluate the claim in light of the new evidence before the court. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court identified four related factors which courts should assess in determining whether a particular defendant has been deprived of his right to a speedy trial: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. These factors "must be considered together with such other circumstances as may be relevant." 407 U.S. at 533. The rule set forth in *Barker* parallels the type of analysis which has been undertaken by the Second Circuit at least since *United*

States ex rel. Von Cseh v. Fay, 313 F.2d 620, 623 (2d Cir. 1963) and *United States v. Simmons*, 338 F.2d 804, 807 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965).[2]

The new evidence before the court is relevant to the reason for the pre-trial delay. When the Court of Appeals considered defendant's speedy-trial claim on the appeal of his conviction, the court was not aware of the reason for the delay in the prosecution. The Court of Appeals could only say that the Government "has offered no justification for its dalliance." 439 F.2d at 755. In light of the evidence which has now been produced, this court finds that the delay by the Government was not merely unjustified, but that it was deliberate and purposeful. Moreover, the essential reason for the delay, the desire to conceal the fact of illegal electronic surveillance by the Government, was unworthy and discreditable. Nevertheless, there is no evidence that the Government sought or procured any tactical advantage over defendant or sought to harass him by the delay in prosecution. See *Barker, supra*, 407 U.S. at 531, 531n.32.[3]

Indeed, the instant case is singular in that there was no prejudice whatever to defendant as a result of the delay. When this court denied defendant's speedy-trial motion prior to trial, defendant was given an opportunity to renew the motion at the trial's conclusion, if he could show any prejudice to him resulting from the delay. No post-trial motion was made.[4] Instead, an appeal from the conviction was taken. On appeal, the Second Circuit stated that defendant had "failed not only in demonstrating actual prejudice in any respect, but also in establishing the credible *possibility* of prejudice." 439 F.2d at 756. [Emphasis in the original.]

Defendant has not made even a colorable claim that his defense was in any way impaired by the pre-trial delay. Moreover, he was subjected neither to pre-trial incarceration nor to anxiety and concern, since the indictment against him remained sealed throughout the period of delay. *See Barker, supra*, 407 U.S. at 532. For the same reason, defendant, unlike Barker and other defendants whose trials are delayed, did not live under a cloud of suspicion or hostility during the period of delay. *See id.* at 533, 534.

While the Government's failure at the appropriate time to disclose to this court or the Court of Appeals the reasons for the suppression of the 1966 indictment is to be firmly condemned, the court holds that the Government's delay which was designed neither to harass defendant nor to impede his defense and which did not harm, prejudice, or otherwise adversely affect him did not deprive defendant of his right of speedy trial.

Dated: New York, New York
March 2, 1973

CONSTANCE BAKER MOTLEY
U.S.D.J.

FOOTNOTES

1. During an income tax prosecution of Malnik in 1969, the Government apparently disclosed the fact of the illegal surveillance of Malnik. See Naftalis Affidavit 9. The first hearing regarding the surveillance issue in Malnik's prosecution took place in September, 1969. See *id.* The 1969 indictment against Alo was filed the following month on October 27, 1969. See also note 4 *infra.*

2. *See Barker, supra,* 407 U.S. at 530n.30. The Supreme Court vacated the judgment in three Second Circuit cases which rejected speedy-trial claims and remanded them for further consideration in light of *Barker. See Fasanaro v. United States,* 408 U.S. 916 (1972); *Saglimbene v. United States,* 408 U.S. 916 (1972); *Campopiano v. United States,* 408 U.S. 915 (1972). On remand, the claims of Fasanaro and Saglimbene were again rejected. *See United States v. Fasanaro,* ———F.2d——— (2d Cir., Docket No. 71-2077, decided January 2, 1973); *United States v. Saglimbene,* ———F.2d——— (2d Cir., Docket No. 71-1652, decided December 26, 1972).

3. *Cf. United States v. Ewell,* 383 U.S. 116, 120, 123 (1966); *United States v. Stein,* 456 F.2d 844, 847 (2d Cir.), *cert. denied,* 408 U.S. 922 (1972); *United States v. DeMasi,* 445 F.2d 251, 255 (2d Cir.), *cert. denied,* 404 U.S. 882 (1971); *United States v. Borman,* 437 F.2d 44, 46 (2d Cir.), *cert. denied,* 402 U.S. 913 (1971); *United States v. Taddeo,* 434 F.2d 228, 229 (2d Cir. 1970), *cert. denied,* 401 U.S. 944 (1971); *United States ex rel. Solomon v. Mancusi,* 412 F.2d 88, 91-92 (2d Cir.), *cert. denied,* 396 U.S. 936 (1969).

4. It should be noted that Malnik was present at defendant's trial in 1970 and that Malnik knew at that time that his office had been invaded by the Government. Defendant's trial counsel claims that he did not learn of the existence of the Edelhertz Memorandum until 1971. Affidavit of Jay Goldberg, dated March 28, 1972.

APPENDIX D

MEMORANDUM OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

69 Cr. 746

UNITED STATES OF AMERICA,

v.

VINCENT ALO, Defendant.

CONSTANCE BAKER MOTLEY, D.J.

Defendant, Vincent Alo, has moved the court to dismiss Indictment No. 69 Cr. 746, filed October 27, 1969, on the grounds that he has been denied the right to a speedy trial as guaranteed by the Sixth Amendment. For the reasons to follow, the motion is denied.

The test for whether a Sixth Amendment right has been violated is nothing more than a careful review of all the circumstances surrounding the delay, to wit, the reason for it, its length and the magnitude of the resulting prejudice, to the end of ascertaining if the delay in bringing the case to trial was "undue or unreasonable." *United States v. Simmons*, 338 F.2d 804, 807 (1964); *United States v. Colon*, 69 Cr. 707 (Memorandum Opinion, S.D.N.Y. 1970). The court finds that defendant has not satisfied these requirements. Defendant has not shown that the reason for the delay in prosecution was unworthy,

despite unsubstantiated allegations to the effect that defendant was indicted on the same charges secretly in 1966. Nor has defendant shown the delay in trial was too lengthy or oppressive. A mere lapse of time alone is not enough to establish denial of a speedy trial. *United States v. Simmons, supra,* at 806. Furthermore, and most importantly, defendant has not shown the court that he has been prejudiced in any way by the delay. While one case, *United States v. Lustman,* 258 F.2d 475, 478 (2d Cir.), *cert. denied,* 358 U.S. 880 (1958), has been read to create a presumption of prejudice where there has been excessive *post*-arrest delay, *United States v. Feinberg,* 383 F.2d 60, 65 n.3 (2d Cir. 1967), *cert. denied,* 389 U.S. 1044 (1968), the delay in the instant case occurred prior to arrest. Hence the instant case comes under the pre-arrest delay line of cases, all of which require a showing of prejudice. *United States v. Feinberg, supra,* at 64; *United States v. Simmons, supra,* at 807; *United States v. Colon, supra.*

These findings read together mandate denial of the motion.

So Ordered.

Dated: New York, New York
September 22, 1970

Constance Baker Motley
U.S.D.J.

APPENDIX E

AFFIDAVIT OF HAROLD BAER, JR. SWORN TO MARCH 26, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

AFFIDAVIT

-v-

69 Cr. 746

VINCENT ALO,
Defendant.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

HAROLD BAER, JR., being duly sworn, deposes and says:

1. I am a member of the law firm of Guggenheimer & Untermeyer. During 1970 and 1971 I was Chief of the Criminal Division of the United States Attorney's Office for the Southern District of New York.

2. On or about September 28, 1970, I was informed by Assistant United States Attorney Gary P. Naftalis that United States District Judge Motley had written an opinion in the captioned case which was inaccurate. Mr. Naftalis told me that Judge Motley in denying Vincent Alo's speedy trial motion had written that there were unsubstantiated allegations of a prior sealed indictment. Mr. Naftalis stated that this was inaccurate because there apparently had been a prior sealed indictment and

that this should be corrected immediately. Mr. Naftalis further indicated that he had never seen the prior sealed indictment nor was he aware of the reasons why it was sealed and subsequently superseded. Inquiries were made of Richard A. Givens, the Assistant United States Attorney who handled the Alo investigation and it was determined that there was in fact a prior sealed indictment. Mr. Naftalis and I both agreed that Judge Motley should be immediately informed of this fact so she could take any action she deemed necessary.

Shortly thereafter, I personally informed Judge Motley that there had been a prior sealed indictment in the Alo case.

s/ Harold Baer, Jr.
HAROLD BAER, Jr.

Sworn to before me this
26th day of March, 1973
s/ Leonard W. Gold
LEONARD W. GOLD
Notary Public, State of New York
No. 60-6555525
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1974

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

VINCENT ALO

69 Cr. 746

Before:

HON. CONSTANCE BAKER MOTLEY,
District Judge.

New York, New York
April 9, 1973 – 5:30 p.m.

APPEARANCES

WHITNEY NORTH SEYMOUR, JR.,
United States Attorney for the
SOUTHERN DISTRICT OF NEW YORK
GARY P. NAFTALIS, Esq.,
HAROLD BAER, Esq.,
Assistant United States Attorneys

BARRY IVAN SLOTNICK, Esq.,
Attorney for Defendant.

THE COURT: Gentlemen, the reason I called you in here, Mr. Slotnick came to me today with this copy of your affidavit, Mr. Baer, which he says has been filed in the Court of Appeals.

MR. BAER: I don't know. Whatever Mr. Naftalis did with it I suppose he did with it. I know I signed it and that was the last I did, other than returning it to him, Judge.

MR. NAFTALIS: We filed it in the District Court, I think, on April 4th or 5th, either last Wednesday or last Thursday.

MR. SLOTNICK: It is my understanding, your Honor, that that was sent up to the Circuit Court of Appeals.

MR. NAFTALIS: Yes.

MR. SLOTNICK: As a supplemental record by the Government.

MR. NAFTALIS: We entered into a stipulation in connection with the record on appeal and either side had the right to supplement the record on appeal with any documents that they felt was useful.

THE COURT: All I can say is that this was not filed before me in connection with a decision that I have just rendered in this matter, I guess, a month or so ago, but I remember making this statement some time during the many hearings we had on this, Mr. Naftalis, that Mr. Baer had told me about an indictment having, in fact, been filed in this case after I wrote the initial opinion on this matter when Mr. Alo first made his motion.

As I told Mr. Slotnick, that is true, as I recall, Mr. Baer did tell me after the opinion came out that he believed that another indictment had been filed and I don't recall exactly what was said at that time, Mr. Baer, except that I thought we concluded that that matter would be taken up at the end of the trial as we had indicated in the opinion, that is, that the opinion had left open for the defendant to renew his motion at the end of the trial if any prejudice was shown, and it was my recollection we left it at that, that you would proceed to bring this to the defendant's attention and if he want-

ed to renew his motion at the end of the trial we would take it up then because I saw no legal significance in that anything which would warrant a change in the opinion because it seemed to me in any event the defendant would have to show prejudice.

That is my recollection of the matter now.

The thing which disturbs me about this affidavit, it says that Mr. Naftalis informed you that I had written an opinion which was inaccurate.

As far as I am concerned, the opinion was not inaccurate because Mr. Naftalis did not say that there was, in fact, an indictment which had been previously filed in this matter at that time.

Mr. Goldberg, who was Mr. Alo's attorney at that time, kept insisting that there was, and I kept saying, "Where is the proof of this? Where is this indictment?

"If you are making this claim, it seems to me you ought to be able to prove it."

Mr. Naftalis, if I recall distinctly, simply did not say yea or nea.

The matter was also on before Judge Weinfeld, as you know, when Mr. Goldberg made a similar claim and there was no indictment of any kind produced, so why consider that my opinion was in correct.

If you are indicating in here that I knew somehow of the existence of this indictment before I wrote the opinion, I think that this ought to be changed to reflect that.

Also I hope you are not insinuating that I knew of any of these facts which have now subsequently come to light as the reasons why this indictment, the original indictment was not brought up.

Particularly this – I have forgotten the name of the man – I didn't know of any of those reasons, Mr. Baer.

MR. BAER: Right. My recollection is very much in accord with exactly what you are saying and the language that Gary, I guess, drafted to put in there, I don't think it was meant to say anything different, although Gary is much closer to it than I was.

All I meant to say and all, in fact, that I recall was that at some juncture – and I wish I could say for sure what juncture that was, but I really can't and what you say refreshes my recollection better than it has been to date – is that at some juncture I had a conversation with Mr. Naftalis and following which I came and told you.

But in terms of time sequence –

THE COURT: My recollection is that it was just before trial. It seems to me you had seen me on a couple other matters at that time and I said, "Well, we will take it up at the end of the trial."

I left it open in the opinion for the defendants to renew their motion.

I saw no great legal significance in the fact that there was or you discovered that there was an indictment that had been previously filed.

I did not know that there were any particular reasons why that had been suppressed as it now turns out from this memo that has now come to light.

Certainly if I knew all those facts then we would have had a hearing on it.

MR. BAER: That is absolutely true.

THE COURT: Then, of course, the defendant didn't renew his motion. Apparently you did not tell the defendant that this indictment had been found so he never renewed his motion and, of course, I forgot about it until they brought this matter on before me again last summer, or whenever it was, moving to set aside the conviction.

When the matter went to the Court of Appeals, as I read the opinion, the Government took the same position, that they were not saying yes or no, that they did not know; I gather Mr. Naftalis didn't know whether there was any indictment or not.

As far as I am concerned, I never saw the indictment. My recollection is that you mentioned it that there had been and I said, "Well, bring it up and we will take care of it," and I assumed the defendant would renew his motion.

MR. BAER: That is exactly my recollection.

THE COURT: As far as I can see it made no legal difference unless he could show some prejudice that there was an indictment filed and here was a superseding indictment, because at that time that was very common in this court for an indictment to be pending three years.

That was certainly not unusual because the U.S. Attorney's office, as it is now, is dreadfully overworked and certainly a three-year old indictment certainly was not uncommon here.

I don't know what the situation is now. Let us hope it is improved.

But certainly no one would be startled here when this case was tried to find a three-year old indictment and certainly it took on no significance to me that it later found an indictment without all of this background.

As I say, this was mentioned on the record, as I recall, when this came up so that this may have been some unfortunate inference in here that somehow I concealed the fact that I knew about this, and I certainly did not do that.

MR. NAFTALIS: Your Honor, since I am representing the Government in this proceeding, I just want the record to be clear on the purpose of that affidavit.

There is no intent in any way to cast any aspersions

upon the Court or to have any inference drawn that the Court was ever informed at any time by anybody connected with the Government as to the reasons for the delay in prosecution.

That was not communicated to the Court and it says nothing about that in that affidavit.

I want the record to be perfectly clear on that.

The reason why we deemed it appropriate to get Mr. Baer's affidavit setting out his best recollection of the facts was that one of the arguments made on the appeal in this case was that you were denying Mr. Alo's speedy trial motion at the time of trial which indicated unsubstantiated application of a concealed indictment, et cetera, that the Government, knowing full well that there was some kind of indictment, just sat back there and failed to disclose this fact to the Court, and we just didn't want to be subject to that kind of criticism in the Court of Appeals since Mr. Baer had, in fact, informed you of that fact.

We are not claiming that the opinion is wrong or anything of that sort, all we are saying is that a claim has been made in the appeal that we just sat back and didn't do anything about the opinion when, in fact, we did make the statement.

THE COURT: All right, as long as that is clear.

I didn't want the record or this affidavit to indicate that I knew anything about these facts or that this particular fact was not disclosed because, as I say, I remember your saying that during the long hours of these hearings last summer and we had many hearings on this, so that that is not a fact which was undisclosed on the record.

He disclosed that, Mr. Slotnick, as I recall.

MR. SLOTNICK: Your Honor, most respectfully, I have read, I guess, every page of the Alo record thirty times. There

is not one mention of this disclosure on the Alo record, nor do I have the faintest recollection of it, your Honor.

I think, and I said this most respectfully that Mr. Naftalis will bear me out, there was no mention of this either during the argument or at any other time on the record, your Honor.

THE COURT: Do you recall that?

MR. NAFTALIS: Your Honor, my best recollection, I am inclined to agree with Mr. Slotnick that this particular matter did not come out during the post-trial motion that Mr. Slotnick made on behalf of Mr. Alo.

That is my best recollection.

THE COURT: Maybe it came out during the hearing we had with the disqualification of the lawyer. I am pretty sure because that was the first time that I remembered it and Mr. Baer's mentioning it to me and remembered then that probably the reason it never came up was because no motion was made at the end of the trial and that we didn't, in fact, have the sealed indictment. We never actually had it. That sealed indictment was never produced until, I guess, last summer, when this came up, when the indictment was finally actually produced in court.

But I thought that at that time you said, Mr. Naftalis, that this was mentioned.

Maybe I am mistaken, but I thought you had brought it up at that time. But in any event, I acknowledge that Mr. Baer mentioned this to me. It had no particular significance to me at that time, except that I told Mr. Baer we would take it up at the end of the trial the usual way as I had indicated in the opinion.

As I say, I heard nothing further about it until this motion was made last summer.

I don't know that there is anything further that needs to be said about this.

MR. SLOTNICK: Just for the record, your Honor, so that the record be clear, I have, again, read all of the record and there is no indication of Mr. Naftalis indicating that Mr. Baer had told your Honor.

When I received the affidavit on Friday afternoon, to be extremely honest with your Honor, I was rather startled by the affidavit. There had never been an indication to me or to any defense counsel on behalf of Mr. Alo that your Honor had known of the indictment and apparently that is correct, because I have, again, this date, looked over the record and there is no such indication and I am sure that Mr. Goldberg did not know about the indictment because if your Honor will recollect –

THE COURT: Let me ask you this:

Did you go through the hearing with respect to Mr. Fawer?

MR. SLOTNICK: Yes, your Honor.

THE COURT: And it is not mentioned there?

MR. SLOTNICK: It is not. I would believe that Mr. Goldberg had no knowledge of it because certainly he was almost in the position of pleading for someone to help him prove that there was the indictment and I had, your Honor, even mentioned during the course of my argument that the Government had not indicated to your Honor that there was an indictment and it is all left blank at that point.

Now this affidavit presented by Mr. Baer certainly clears up the situation.

THE COURT: I see. All right, gentlemen.

MR. NAFTALIS: I just want it to be clear that we were trying to clear the air. We were never implying that your Honor ever knew the reasons for the delay of the 1966 indictment. Indeed, as we pointed out in our briefs in the Court of Appeals none of the Assistant U.S. Attorneys who

prosecuted the appeal knew of the reasons for the delay or, indeed, even saw the indictment before the trial.

MR. BAER: Let me say with respect to that, that that is true. I had not seen the indictment nor, in fact, did I know anything about it. It was a period of time or it occurred during a period of time after which I had left this office under Bob Morgenthau and before I returned when Mr. Seymour came, so I was as totally blank, and I am sure gave you no more information than you recalled and I have absolutely no recollection even of a time sequence where you were in those proceedings when I came and had that chat.

When you tell me your recollection, it sounds to me very much like what I remember.

THE COURT: All right.

Let me say this, perhaps that should be clarified, this first sentence here, that the Judge had written an inaccurate opinion; as I indicated, I don't think it was inaccurate at all because I didn't have any such information other than Mr. Goldberg's assertion that there was such an affidavit.

I think that is an unfortunate sentence because it tends to indicate that the opinion was somehow inaccurate.

I don't think that is true at all, Mr. Baer.

MR. BAER: No, I think that is right and I think maybe I can impose upon Mr. Naftalis to submit to me another affidavit choosing an appropriate word.

THE COURT: Yes. At least when I read it I was shocked and I gather that is why Mr. Slotnick brought it to me. I certainly didn't know of the existence of any indictment at the time, so I don't think it is correct to say that my opinion was incorrect.

MR. NAFTALIS: It may be an unfortunate choice of words. We certainly don't mean to make any implications at all.

Mr. Zirin before Judge Weinfeld had assumed arguendo there was a prior sealed indictment and the 1969 indictment which was tried before your Honor and the jury was a superseding indictment.

We always proceeded on that assumption and the case was argued in the Court of Appeals under that assumption. That is the record.

Thank you, your Honor.

MR. SLOTNICK: We have filed our records and papers in the Court of Appeals and I fear in all probability there will be more post-decision matters before the Court of Appeals than there will be pre-decision matters as the record piles up.

THE COURT: All right.

MR. SLOTNICK: Thank you, your Honor.

LE COPY

72-1550

JUN 20 1973

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

No. 1550

VINCENT ALO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

BARRY IVAN SLOTNICK
15 Park Row
New York, N.Y. 10038
Counsel for Petitioner

JACOB KOSSMAN
1325 Spruce Street
Philadelphia, Pa. 19107
of Counsel

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

TABLE OF CONTENTS

Page

Supplementary Brief 1

Cases

Barker v. Wingo, 407 U.S. 514 (1972) 2

Dickey v. Florida, 398 U.S. 30, 37-38 (1970) 3

Strunk v. United States, No. 72-5521 (U.S. Sup.Ct., June 11, 1973) 2

United States v. Strunk, 467 F.2d 969 (uth Cir. 1972) 2

Other Authorities

Federal Criminal Rule 20 2

Rule 24(5) (Supreme Court) 2

United States Constitution, Sixth Amendment 2

IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM 1972

NO. 1550

VINCENT ALO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

Pursuant to Rule 24(5) of this Court, petitioner submits this supplemental brief. On June 11, 1973, this Court decided *Strunk v. United States*, No. 72-5521, which adds further basis for petitioner's prayer to this Court for relief from the deprivation of his constitutional right to a speedy trial.

The facts in *Strunk* are, of course, well known to this Court. They involve the post-indictment delay of a federal criminal case of 259 days, less than nine months, between indictment and arraignment. The defendant in that case, freely admitting that the delay had no prejudicial effect on the preparation of his defense, contended that the delay nonetheless violated the Sixth Amendment to the Constitution. That claim, denied in the District Court, was upheld by the Court of Appeals for the Seventh Circuit. *United States v. Strunk*, 467 F.2d 969 (7th Cir. 1972). Chief Judge Swygert, writing for a unanimous court, said that the delay was unusual and critical and "calls for explanation as well as justification." *Id.* at 972. The explanations offered, understaffing of the office of the U.S. Attorney and deferment for possible proceedings under Federal Criminal Rule 20, were not accepted by the court. Employing the multi-factor approach promulgated by this Court in *Barker v. Wingo*, 407 U.S. 514 (1972), the court of appeals held that the absence of prejudice in the preparation of the defense did not prevent the conclusion that the right to a speedy trial had been denied to the defendant. The defendant's argument that he had been prejudiced in losing the possibility of serving his federal sentence concurrently with a prior state sentence was found unpersuasive, the court of appeals noting that the federal sentence could always be made to commence at the conclusion of the state sentence, no matter how promptly the federal trial

had been held.

The *Strunk* decision at the court of appeals level is, on this ground, directly in conflict with the decision of the Second Circuit in this case. The Second Circuit position that prejudice, demonstrable and proven by the defendant, is a necessary condition to the establishment of a claim to denial of speedy trial, is controverted by the Seventh Circuit ruling. The latter court, following more carefully and properly this Court's guidance in *Barker*, treats the question of prejudice as one of the factors to be weighed, not a conclusive factor. That court said: "After balancing the various factors outlined in *Wingo*, we conclude that the defendant was denied a speedy trial to his prejudice." 467 F.2d at 973.

This Court's decision, also unanimous through an opinion by the Chief Justice, upholds the decision by the court of appeals on the conclusion that a constitutional deprivation had occurred by the 259 days of delay. The Court was guided in part by the action of the Department of Justice, which failed to seek formal review of the court of appeals' decision, thereby acquiescing in the ruling as to denial of speedy trial. Plainly not content to let a matter of constitutional significance pass without evaluation, this Court also commented upon the merits of the speedy trial decision and concluded that the court of appeals had been correct. This Court reasserted that unintentional delays caused by overcrowded courts or understaffed prosecutors are to be weighed less heavily than intentional delays. The Court underscored its previous declaration in *Dickey v. Florida*, 398 U.S. 30, 37-38 (1970):

> ". . . the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to

provide a prompt trial."

The Court said that even the situations in which the accused has little or no interest in being tried quickly are subject to the constitutional strictures:

> "The desires or convenience of individuals cannot be controlling. The public interest in a broad sense, as well as the constitutional guarantee, command prompt disposition of criminal charges." (Note 2).

The views announced by this Court in *Strunk* are challenged by the position of the Government and the courts below in this case. The delay here, post-indictment, was an extraordinary three years, not the relatively brief 259 days that the Seventh Circuit found unusual and critical in *Strunk*. The explanations proferred by the Government in *Strunk*, while not acceptable to the court of appeals or this Court, were not unworthy and discreditable. In this case, there was intentional delay for reasons that were "condemned," an effort conceded by the Government to cover up illegal electronic surveillance of an attorney's office in 1963. The strategy for the cover up is now revealed in a 1968 memorandum of the Department of Justice, which implicates particularly former United States Attorney Morgenthau who "expressed great concern over the disclosure . . . because he did not want to spread on the record that the Department had engaged in electronic surveillance of a member of the bar." (Petition, App. C, p. 5). This Court and the court of appeals in *Strunk* declared that the delays there called for explanation as well as justification. To this date the Government has offered no acceptable explanation and no justification for its conduct in this case. Rather the Government has vehemently resisted petitioner's efforts, since the beginning

of the prosecution, to bring the facts to light. The embarrassment of the Government leads Government counsel to seek to obfuscate and create false issues. This Court, we submit, ought to call upon the Government to account.

The Seventh Circuit in *Strunk* explored new constitutional territory in trying to fashion relief for the deprivation of speedy trial. The court's imaginative effort was to decree that the defendant should receive credit on his sentence for the 259 days of impermissible delay in bringing the indictment to trial. This Court rejected that equitable principle of relief. The Court held that, where the Constitution has been violated in this respect, dismissal of the indictment is the only possible remedy. Unfortunately, in petitioner's case, dismissal of the indictment offers the most partial relief. Petitioner has been imprisoned on this indictment since October 1970. There are only a few months remaining on his sentence. The severe remedy that this Court ruled as the only permissible remedy for denial of a speedy trial cannot be effectuated in this case. Nonetheless, petitioner presses with undiminished vigor for the vindication of his Sixth Amendment right to a speedy trial.

Petitioner respectfully submits that this Court's action in *Strunk v. United States* adds significantly to the arguments for granting the writ of certiorari in this case. The public interest in a broad sense, to use this Court's phrase, requires that the Government be held responsible for its intentional and discreditable decisions to deprive persons of their rights under the Constitution. No prior case provides the clarity of facts exhibiting this form of prosecutorial manipulation of the timing of the criminal process. Ten years ago, the Government planted an illegal bug in a lawyer's office. The ramifications of that in denying petitioner the right to a speedy trial have yet to be

fully explored. Petitioner respectfully urges that this Court grant this petition for review.

Respectfully submitted,

BARRY I. SLOTNICK
Counsel for Petitioner

JACOB KOSSMAN
Of Counsel

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1550

VINCENT ALO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the subsequent confirmation of a fact which was assumed *arguendo* by the court of appeals on his direct appeal—the existence of a prior sealed indictment against him—constitutes newly discovered evidence showing that he was denied a speedy trial.

1. After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of obstructing an investigation by the Securities and Exchange Commission by giving false testimony, in violation of 18 U.S.C. 1505. He was sentenced to imprisonment for five years and to pay fines aggregating $10,000. The court of appeals affirmed. *United States* v. *Alo,* 439 F. 2d 751 (C.A. 2), certiorari denied, 404 U.S. 850. Petitioner thereafter moved to

vacate the judgment of conviction or alternatively for a new trial, on the ground that newly discovered evidence established that he had been denied his right to a speedy trial (Pet. App. C2-C3). This motion was denied by the district court (Pet. App. C10). The court of appeals affirmed without opinion and denied petitions for rehearing (Pet. App. A1-A2).

On direct appeal of his conviction, petitioner contended that he had been deprived of his Sixth Amendment right to a speedy trial because the 1969 indictment, upon which he was tried, merely supplanted a substantially identical sealed indictment returned in 1966. While the government did not at that time concede the existence of the prior indictment, it did not deny its existence. Both parties argued the case on the assumption that such an indictment was returned, and the court of appeals decided the case upon that assumption. The court pointed out that, although the government offered no excuse for this delay, the 1966 indictment had been sealed, petitioner had suffered neither pretrial detention nor personal anxiety and public obloquy, the circumstances made it clear that the delay did not hamper petitioner's capacity to present his defense, and there was not even the credible possibility of prejudice. *United States* v. *Alo,* 439 F. 2d 751, 754-756, certiorari denied, 404 U.S. 850.

Petitioner's present contentions are based largely upon a Department of Justice memorandum produced by the government after his direct appeal in response to a motion by petitioner. The memorandum confirmed the existence of the 1966 sealed indictment. According to the memorandum, the reason for the sealing of the indictment was that on the same day it was returned a related indictment was returned against Alvin Malnik, a Miami attorney, who had been the subject of electronic

surveillance. The United States Attorney had "expressed great concern over the disclosure of these logs because he did not want to spread on the record that the Department had engaged in electronic surveillance of a member of the bar." The memorandum further states that the Assistant United States Attorney later proposed to dismiss the Malnik indictment and to open the Alo indictment in order to proceed with his prosecution (Pet. App. C4-C5) since Alo was not the subject of surveillance, there was no indication that he was overheard and the case against him rested upon the independent sources. The memorandum further showed that the electronic surveillance of Malnik had occurred from July 5, 1963, to September 17, 1963; that the SEC had commenced its investigation on November 27, 1964, and that petitioner's false testimony had not been given until 1966 (Pet. App. C5).

In denying the instant motion, the district court found that the primary reason for the delay in prosecuting petitioner was the government's reluctance to disclose the surveillance of attorney Malnik; that another reason for the delay was an investigation to determine whether a corrupt SEC official was leaking information to petitioner; that the government was not in possession of any recorded statements which were the product of the Malnik surveillance; and that the government had investigated further and found no indication that petitioner was at any time overheard (Pet. App. C6-C7).

The district court concluded that the surveillance, which terminated in September 1963, could not have provided exculpatory evidence concerning defendant's false statements in 1966 and, as the court of appeals had previously found (439 F. 2d at 756), there was not

even the credible possibility of prejudice to the petitioner because of the pretrial delay. While the court expressed disapproval of the govenment's failure to disclose at the appropriate time its suppression of the 1966 indictment and its reasons for doing so, the court found that the delay "was designed neither to harass defendant nor to impede his defense" and did not prejudice or otherwise adversely affect him in any way or deprive him of his right to a speedy trial (Pet. App. C8-C10). The court of appeals affirmed this finding (Pet. App. A1).

2. Upon direct appeal of the conviction, the court below assumed the existence of the prior indictment, considered the case as one in which the government had offered no justification for the delay, and found no prejudice to petitioner. Petitioner is essentially seeking to relitigate this issue. We submit that it was correctly decided and does not warrant further review.

This Court has adopted a balancing approach for the decision of speedy trial issues. The principal factors considered are length of delay, reason for delay, the accused's assertion of his right, and the prejudice accruing to him. *Barker* v. *Wingo*, 407 U.S. 514, 522, 530. The Court stated as to the last of these (407 U.S. at 532):

> A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his

> case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

See also *United States* v. *Ewell,* 383 U.S. 116.

Petitioner, who has consistently been unable to make a showing of prejudice of any kind, claims that the lack of demonstrable prejudice is overbalanced by the alleged misconduct of the government in sealing the 1966 indictment and not revealing its reasons for so doing. As the trial court found, however, there was nothing to indicate a desire on the part of the government to oppress or harass petitioner and the government's action did not in fact adversely affect petitioner. The courts below properly balanced the reasons for the delay with the other factors at issue and in light of the total absence of prejudice to the petitioner correctly concluded a second time that he was not denied his right to a speedy trial. There is no reason for further review by this Court.

3. Petitioner also argues that in the circumstances of this case, the burden should be upon the government to show lack of prejudice. He seeks in this way to escape the fact that he has been unable to show any prejudice whatsoever. But, as this Court stated in *Barker* v. *Wingo,* the advantages of delay often accrue to the defendant in the trial of a criminal case, inasmuch as the government has the burden of proving guilt beyond a reasonable doubt. 407 U.S. at 521. And, contrary to petitioner's contention that "specific proof of prejudice frequently entails the virtually impossible task of proving a negative pro-

position" (Pet. 20), such proof is normally of a very positive nature. See, *e.g.*, *Dickey* v. *Florida*, 398 U.S. 30, 38. To require the government to prove the absence of prejudice when the petitioner can show none would truly be to require the proof of a negative.

4. Finally, petitioner in a Supplemental Brief erroneously seeks to rely upon *Strunk* v. *United States*, No. 72-5521, decided June 11, 1973. In that case, the court of appeals held that the inadequately explained delay in bringing the defendant to trial, while not prejudicing him in the preparation of his defense, did prejudice him in the serving of his sentence by the number of days involved in the delay, because the sentence was to be concurrent with a previously imposed sentence in an unconnected case. Limited relief was accordingly afforded by reducing the sentence. This Court held, however, that since the court of appeals had determined that the right to a speedy trial had been denied and there was no appeal from that determination, the question whether there was in fact a denial of that right was no longer at issue and the court specifically did not rule on that question. The Court held that where a denial of the right to a speedy trial has been shown the remedy must be by dismissal of the indictment. Thus, neither the court of appeals nor this Court indicated in *Struck* that it would find a denial of the right to a speedy trial where, as here, no prejudice of any kind has been shown.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07

FILE COPY

AUG 27 1973
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

NO. 1550

72-1550

VINCENT ALO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

BARRY I. SLOTNICK
15 Park Row
New York, N.Y. 10038
Counsel for Petitioner

JACOB KOSSMAN
1325 Spruce Street
Philadelphia, Pa. 19107
of Counsel

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

CONTENTS

	Page
Reply Brief	1

Table of Cases

Barker v. Wingo, 407 U.S. 514 (1972)	3
United States v. Dunn, 459 F.2d 1115 (D.C. Cir. 1972)	5
United States v. Mack, 298 F.2d 509, 511 (1972)	4
United States v. Rucker, 464 F.2d 823 (D.C. Cir. 1972)	5

Other Authorities

United States Constitution, Sixth Amendment	3
Rule 48(b), Rules of Criminal Procedure	7

IN THE

Supreme Court of the United States

NO. 1550

VINCENT ALO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

The Memorandum for the United States in Opposition to the Petition for Certiorari is marred by such factual distortions and legal misconceptions that a brief reply is made necessary.

1. The United States is attempting to sidestep the issue of the gross misbehavior of the Government in this case. The Solicitor General, in referring to those acts, speaks of "alleged misconduct" (p. 5) about which the courts below expressed

"disapproval" (p. 4). Government misconduct in this case is not "alleged" – it has been thoroughly proved! The evidence was extracted from the unwilling Government after years of official deception. The 1968 Department of Justice Memorandum, brought to light in this post-conviction proceeding, reveals the bald prosecutorial conspiracy to conceal the illegal placing of electronic bugs in a lawyer's office by a surreptitious breaking and entry at night in 1963.

The primary role of United States Attorney Robert Morgenthau in this matter is disclosed on the face of the memorandum. Two Assistant Attorneys General and the Chief of the Fraud Section of the Criminal Division are direct parties to the Memorandum. These officials were deciding in 1968 whether to continue to hide the 1966 indictment against petitioner. As we now know that indictment was hid and never unsealed. Someone, and we do not yet know who, decided that the concealment activities would be aided by bringing forth in 1969 a fresh indictment. This whole pattern of inexcusable behavior, successfully disguised from petitioner and from the courts for years, cannot be described with any reasonable accuracy in the laundered language of the Solicitor General as "alleged misconduct."

In the Court of Appeals, the United States was slightly more candid in its argument. Counsel for the Government then described the actions of the prosecutors as "unwise," "misguided," and "improper." Even these phrases did not do justice to the calculated plan to conceal illegal electronic surveillance by suppression of the indictment against petitioner. At least it was then admitted that a serious error had been

committed. The Solicitor General's current view in this Court is that the whole affair involves merely "alleged" misconduct.

The District Court "firmly condemned" the Government for its actions, which Judge Constance Baker Motley described as "unworthy and discreditable." Translated in the cosmetic language of the Solicitor General, Judge Motley expressed mere "disapproval."

The attitude expressed by the Solicitor General is further demonstration of the necessity for this Court to grant the writ of certiorari in this case. The highest officers of the Department of Justice are not holding themselves accountable for the behavior of prosecuting authorities who intentionally violate the Sixth Amendment rights of defendants. Government prosecutors are invested with great discretion on many issues, including the timing of criminal prosecutions. This Court's declarations on the right to a speedy trial make the proper exercise of those prosecutorial powers a factor in the balance of factors that concern speedy trial. This Court declared in *Barker v. Wingo*, 407 U.S. 514 (1972), that the conduct of the Government was one of the key factors in determining whether the Sixth Amendment had been violated. The Solicitor General implicitly denies that in his Opposition. Until the highest officials of the Department of Justice can openly and fairly deal with the issues of misconduct in the denial of speedy trial, this Court's decision in *Barker v. Wingo* will be a nullity in the prosecutors' offices.

2. The Memorandum in Opposition fails to respond to petitioner's contention that the burden of proof on the issue of prejudice should lie on the Government after substantial delay.

Of the *four* factors which this Court held relevant in *Barker v. Wingo*, the only *one* which the Government seems to acknowledge is defense prejudice. In light of the massive delay of three years from indictment to trial, petitioner contends that the evidentiary burden should be placed on the Government. The response of the Opposition is designed to fend off the seriousness of that question.

The Solicitor General maintains that it would be difficult for the Government to prove that a three year post-indictment delay did not injure the defendant. This Court has already noted that it is extremely difficult, after substantial delays, for either party to prove what might have transpired if the right to speedy trial had been vindicated in the first instance. Precisely because it is quite difficult to demonstrate what *might* have happened in a hypothetical situation of a prompt trial, petitioner contends that it is important to assign the burden of proof with the utmost care. The underlying constitutional right to a speedy trial is virtually conditioned upon the proper procedural balance of burdens.

Lower federal courts have been developing and applying formulae to require the Government to prove the absence of prejudice in cases of exceptional delay caused by the prosecution. Thus, the District of Columbia Court of Appeals has been using the concept of *prima facie* merit in a speedy trial case after delay of one year. See *United States v. Mack*, 298 F.2d 509, 511 (1972). Circuit Judge Tamm on the Court of Appeals for the District of Columbia Circuit proposed a rule that went even further to protect the defendants' right to a speedy trial; he proposed automatic dismissal after one year. The Circuit Court did not endorse Judge Tamm's proposal. That

court does follow the rule that the burden of proof shifts to the Government after substantial delays have occurred. See *United States v. Rucker*, 464 F.2d 823 (D.C. 1972); *United States v. Dunn*, 459 F.2d 1115 (D.C. Cir. 1972).

The courts below in this case held that the burden to show prejudice to the defense lies on the defendant. In spite of the extraordinary, virtually unprecedented length of the delay — three years from indictment to trial — the courts found that the defendant had not come forward to prove how the delay had harmed him. Further, no consideration was given to the gross misconduct that caused the delay. Most cases involving claimed denial of the right to speedy trial involve plausible, if not justifiable explanations that can be offered without causing the court to sharply criticize the Government. Thus, in length of delay and cause of delay, this case warrants the application of a rule requiring the Government to carry the burden of proof.

The decision of the courts below is thus in direct conflict with the decisons of other federal courts. That conflict, moreover, is exacerbated by the Solicitor General's Memorandum which continues to insist that the burden lies upon petitioner.

This issue is important and timely. Litigation concerning the right to speedy trial is growing in volume throughout the nation. The manner in which those cases are tried will be a significant issue in a great percentage of the controversies that reach this Court. Resolution of the conflict in the lower courts, and rejection of the position of the Solicitor General through review of this case will be an important improvement in the

administration of justice by federal and state courts.

3. The Memorandum in Opposition restates the Government's argument throughout the proceedings in the courts below that petitioner has not proven any actual prejudice as a result of the delay. In the view of the Solicitor General, this is the dispositive issue. Disappointingly, the Solicitor General's Memorandum fails to come to grips with the manifest *possibility* of prejudice that is clearly presented. Instead, the Opposition tries to conceal the nature and extent of the probable prejudice which flows from the illegal electronic surveillance that the Government tried for so long to keep secret.

Petitioner's conviction rests upon a finding that he obstructed an S.E.C. investigation by testifying falsely about certain corporate transactions. Under the prosecution theory, petitioner was an undisclosed principal in association with an attorney, Alvin Malnik. It was Malnik's office that was "bugged" illegally in 1963. The transactions underlying the S.E.C. investigation occurred during that period. The Government maintains that its logs of the "bugging" do not contain any exculpatory matter that would have aided petitioner in his defense of non-involvement in the transactions in question. This completely self-serving statement by the Government has not been corroborated in any way; not even the selective logs have been shown to the petitioner or to the court. Had there been a timely prosecution, rather than the three year delay, petitioner would have known of the illegal surveillance and its fruits. Defense interpretation of the materials obtained by the "bugging" could differ markedly

from the bland assertions made by the Government. Leads which only the defendant could have recognized might have been revealed. The opportunity to explore ways of disputing the Government's theory of petitioner's role as undisclosed principal was lost entirely through the Government's calculated suppression of the indictment. Since the Government refuses even yet to make even the total logs available to the trial court, petitioner is powerless to give specific demonstration of the facts that would have been useful in the defense of his case. Passage of time has clouded the possibility of following out any leads that existed.

The Solicitor General simply parrots the courts below in iterating that conclusive proof of prejudice has not been made. There has been — and is — substantial proof of the significant possibility of prejudice. Under the circumstances of the extreme delay caused by the Government's unworthy and discreditable behavior, that is sufficient to show a denial of the right to speedy trial.

4. One dimension of prejudice flows directly and obviously from the prosecution stratagem of obtaining a new indictment in 1969. This was certainly intended to avoid the problem of moving on a 1966 indictment that was plainly stale. The "cover up" technique of a new indictment that was not on its face untimely, coupled with the extended effort of the prosecutors to avoid admission of the existence of an indictment already three years old, effectively deprived petitioner of the ability to exercise Rule 48(b) of the Rules of Criminal Procedure. That rule permits a defendant to seek the relief of dismissal "if there is unnecessary delay in bringing a defendant to trial." The

deception practiced by the prosecution on the defendant, and on the courts, deprived petitioner of even the *opportunity* to make this defense.

5. The Solicitor General's Memorandum entirely fails to respond to petitioner's contentions that this case is appropriate for review under this Court's supervisory powers over the administration of justice in the federal courts. This question raises centrally the issue of the fairness of the proceedings, and the Solicitor General's silence is eloquent evidence of the keen embarassment of the Government. No gloss can be fabricated to mask the abuses of power and the violations of fair play that took place here. The Government stands on a legalistic and doctrinal position that does not bear scrutiny in terms of this Court's supervisory power.

For the reasons advanced in the Petition for Certiorari, the Supplemental Brief, and this Reply Brief, it is respectfully submitted that this Court should grant certiorari.

Respectfully submitted,

BARRY I. SLOTNICK
Counsel for Petitioner

JACOB KOSSMAN
Of Counsel